

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

HORACE DAILEY, JR.,

Defendant-Appellee.

UNPUBLISHED

August 26, 2003

No. 239683

Genesee Circuit Court

LC No. 01-008271-FH

Before: Markey, P.J., and Cavanagh and Saad, JJ.

PER CURIAM.

Plaintiff appeals by delayed leave granted the sentence of five to twenty years in prison imposed on defendant's plea-based conviction of possession with intent to deliver 50 grams or more but less than 225 grams of cocaine, MCL 333.7401(2)(a)(iii). We vacate the sentence and remand for resentencing. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The police received information that cocaine would be delivered to a specific address on a certain date. The police established surveillance of the address. Defendant and another man arrived at the address, stayed for a short time, and then departed. When the police initiated a traffic stop, defendant attempted to flee, but was apprehended. A search of his person revealed 125.3 grams of cocaine and \$3,797 in cash.

Defendant pleaded guilty of possession with intent to deliver 50 grams or more but less than 225 grams of cocaine. The statutory sentencing guidelines recommended a minimum term range of fifteen to twenty-five months. At the time, the offense of possession with intent to deliver 50 grams or more but less than 225 grams of cocaine carried a mandated sentence of not less than ten years nor more than twenty years in prison.¹ Defendant argued that substantial and

¹ 2002 PA 665, effective December 26, 2002, made extensive revisions to MCL 333.7401. MCL 333.7401(2)(a)(iii) now provides that possession with intent to deliver 50 grams or more but less than 450 grams of a controlled substance is punishable by imprisonment for not more than twenty years or a fine of not more than \$250,000.00, or both. As a general rule, the proper sentence is that which was in effect at the time the offense was committed. See *People v Schultz*, 435 Mich 517, 530; 460 NW2d 505 (1990). The amended version of MCL 333.7401(2)(a)(iii) enacted while this case was pending on appeal is ameliorative in that it eliminates the

(continued...)

compelling reasons existed for the trial court to depart below the mandated minimum term. The trial court agreed, and citing defendant's age, his attainment of a high school education, two professional licenses, his employment history, his family support, and his history of substance abuse. The trial court sentenced defendant to five to twenty years in prison, with credit for one day served in jail.²

To constitute a substantial and compelling reason for departing from a mandated sentence, a reason must be objective and verifiable and must irresistibly hold the attention of the court. *People v Fields*, 448 Mich 58, 67; 528 NW2d 176 (1995). Appropriate factors for consideration include: (1) mitigating circumstances surrounding the offense; (2) the defendant's prior record; (3) the defendant's age; (4) the defendant's work history; and (5) post-arrest events, such as the defendant's cooperation with law enforcement officials. *People v Daniel*, 462 Mich 1, 7; 609 NW2d 557 (2000). We review the trial court's determination of the existence of a substantial and compelling reason for departure for clear error, the determination that the reason is objective for error, and the determination that the reason constituted a substantial and compelling reason to depart from a mandated term for an abuse of discretion. *Fields, supra*, 77-78. A trial court must specifically articulate on the record its reasons for determining that considered factors constituted substantial and compelling reasons for departing from a mandated minimum term. *Daniel, supra*, 8-9.

We vacate defendant's sentence for possession with intent to deliver 50 grams or more but less than 225 grams of cocaine and remand for resentencing on that conviction only. That offense carried a mandated minimum term of ten years; however, the trial court found that substantial and compelling reasons existed to depart from the mandated term and imposed a minimum term of five years. The trial court cited defendant's age, his pursuit of education, his employment history, his family support, and his history of substance abuse as factors supporting its decision, but failed to explain why these constituted substantial and compelling reasons to depart from the mandated minimum term as required. *Daniel, supra*. Defendant's age, pursuit of education and attainment of professional licenses in barbering and truck driving, his employment history, and family support were appropriate factors for consideration. *Id.*, 7; see also *People v Perry*, 216 Mich App 277, 282; 549 NW2d 42 (1996). Nonetheless, we find that defendant's age, thirty-eight at the time of sentencing, was not exceptional and did not support a downward departure from the mandated minimum term. Defendant was not a teenager or young adult who exercised poor judgment. Rather, all the evidence supports the conclusion that defendant chose to deliver narcotics. Similarly, defendant's long history of substance abuse not only fails to warrant a downward departure from the mandated minimum term, it also effectively rewarded defendant for his drug use.

(...continued)

requirement that the sentencing court impose a minimum term of not less than ten years. On remand, defendant is entitled to seek resentencing under the amended version of MCL 333.7401(2)(a)(iii). See *People v Shinholster*, 196 Mich App 531, 533-534; 493 NW2d 502 (1992); *People v Sandlin*, 179 Mich App 540, 543-544; 446 NW2d 301 (1989).

² The trial court imposed a concurrent sentence of fourteen months to two years for defendant's plea-based conviction of resisting and obstructing a police officer, MCL 750.479. Plaintiff does not challenge the sentence imposed on that conviction.

We find that the trial court abused its discretion by holding that defendant's age and history of substance abuse constituted substantial and compelling reasons for departing from the mandated minimum term. *Fields, supra*, 78. The remaining factors cited by the trial court, while appropriate for consideration, were not exceptional and did not warrant downward departure from the mandated minimum term. This is especially true given that there were no mitigating circumstances surrounding the offense and that defendant refused to cooperate with law enforcement officials. *Daniel, supra*.

We vacate defendant's sentence for possession with intent to deliver 50 grams or more but less than 225 grams of cocaine and remand for resentencing on that conviction only. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Mark J. Cavanagh
/s/ Henry William Saad